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Supreme Court of the United States.

October Term, 1904.

No. 181.

WM. H. McCAFFERTY et al.,
Appellants,
v.
LIZZIE C. MANOGUE et al.,
Appellees.

Brief on Behalf of Appellees, Manogue.

EDWIN FORREST,
A. A. HOEHLING, Jr.,
Attorneys for Said Appellees.

WASHINGTON, D. C.
Press of Gibson Brothers.
1905.

Supreme Court of the United States.

OCTOBER TERM, 1904.

WILLIAM H. McCAFFREY *et al.*,
APPELLANTS,
v.
LIZZIE C. MANOGUE *et al.*

No. 131.

BRIEF ON BEHALF OF APPELLEES, MANOGUE.

THE CASE.

The bill in this case was filed by William H. McCaffrey and James B. McCaffrey, sons of the late Hugh McCaffrey, and devisees under the will of the late Frank T. McCaffrey, to construe the will of Hugh McCaffrey, which, among other things, contains the following provisions:

"I give and bequeath to my daughter Mary A. Quigley house number 301 at southwest corner of 11th and C streets southeast, being in lot number 5, in square 970, with the store and dwelling, stock and fixtures, and lot on which it stands, also houses numbers 13 and 15 6th street southeast with lots on which they stand, being parts of lots 19 and 20 in square number 841, also any money in bank to my account at the time of my death, also any money due to me, also any building association stock.

She is to pay funeral expencies and any other legal debts I may owe, also to care for my lot in Mount Olivet cemetery.

"I give and bequeath to my son, James B. McCaffrey, house number six hundred and two (602) East Capitol street and lot on which it stands, being in lot number ten (10) in square number eight hundred and sixty-eight(868).

"To my son, William H. McCaffrey, I give and bequeath house 604 East Capitol street being in lot number ten (10), in square number eight hundred and sixty-eight (868) and lot on which it stands.

"To my daughter, Lizzie Manogue, I give and bequeath house number fourteen hundred and twenty-three (1423) Corcoran street N. W., and lot on which it stands, being lot number fifty-four (54) in square number two hundred and eight (208).

"To my son, Francis T. McCaffrey, I give and bequeath house five hundred and nineteen (519) East Capitol street, and lot on which it stands, being part of lot number twenty (20) in square eight hundred and forty-one (841), also my horse and buggy.

"To my grandson, Joseph Quigley, my watch and chain." (*R.*, *3*).

The contention is made by appellants that, by the clauses quoted, the devisees named took an estate in fee and not a life estate (*R.*, *2–6*). The defendant Lizzie C. Manogue filed answer, claiming that under said devise the parties named only took a life estate, and the defendant George W. Manogue submitted the question to the determination of the court. After replication, testimony was taken which showed, among other things (*R.*, *14–24*), that the personal estate of Hugh McCaffrey was more than sufficient to pay his debts, and that Mary A. Quigley or her estate received the surplus, amounting to over two thousand dollars.

On hearing, the trial court decreed that the complainants acquired only an estate for their respective lives in the certain property devised to them by the will of their father, and in a formal recital in said decree in construing

the will, as asked for by the bill of complaint, the decree recited that the respective devisees under the will alluded to took and acquired each only an estate for his or her life, and that neither of the devises was enlarged from a life estate to an estate in fee-simple by reason of anything in the will contained or by reason of any charge made or duty imposed upon Mary A. Quigley, one of the devisees (*R.*, *25–26*).

From that decree, an appeal was taken to the Court of Appeals of the District of Columbia, with the result that said decree was affirmed (*R.*, *36;* Opinion, *R.*, *29–35*). From that decree of affirmance, an appeal was taken to this court.

Errors Assigned.

The appellants, in the brief filed herein, assign error:

1. In adjudging that Francis T. McCaffrey and William H. McCaffrey, respectively, took only an estate for life in the property devised to each.

2. In considering evidence as to the extent of testator's personal estate.

3. In reciting in the decree that none of the devisees named in the will took more than a life estate; and in refusing to amend the decree by striking such recital therefrom.

BRIEF.

Bearing in mind that the will of Hugh McCaffrey, here under consideration, contained no words of limitation or inheritance, the following propositions and questions are presented by the present appeal:

1. The language of each of the several devises, standing alone and unaided by resort to legal implication, admittedly pass but a life estate.

2. Does the direction that Mary A. Quigley pay funeral expenses and debts have the effect of enlarging the life estate in the real estate devised to her to a fee-simple?

3. If it has, does that enlargement by implication extend to the other devises containing no such direction?

4. Is the recital contained in the decree unauthorized, and is such objection reviewable?

The propositions and questions will be considered in the order stated.

I.

A Devise Without Words of Limitation or Inheritance Passes only a Life Estate.

This proposition apparently is not, and certainly cannot be, successfully controverted. The authorities sustaining it are uniform in every jurisdiction, and the same rule of decision obtains in the District of Columbia, with the exception only of cases coming within the provisions of the Code, of which, however, the case at bar is not one.

2 Jarman on Wills, p. 267.
2 Redfield on Wills, p. 321.
Farrar *v.* Ayres (*5 Pick., 404*).
McAleer *v.* Schneider (*2 App. D. C., 461*).
McCaffrey *v.* Little (*20 id., 116*).
Wright *v.* Denn (*10 Wheat., 204, 236, 237*).

And this is so notwithstanding the testator in the will may have declared an intention to dispose of his whole estate (2 Jarman on Wills, p. 267; Wright *v.* Denn, *supra*), although here there is absolutely no expression by testator of any intention to dispose by will of his entire estate in the property, nor does he attempt to dispose by will of his entire property.

II.

Is the Devise to Mary A. Quigley Enlarged by Legal Implication to a Fee?

Admitting the first proposition, appellants reply that Mary A. Quigley took her devise *charged*, either in respect of the real estate devised to her or in respect of her personally as a *devisee*, with the payment of funeral expenses and debts of testator, and that therefore her devise is by legal implication *enlarged* to a fee.

In discussing this particular contention, the fact that said devisee was, in the same connection, requested or directed by testator to "*care* for my lot in Mt. Olivet cemetery" is of no importance.

Such direction, indefinite alike both as to quantum or object, as well also invalid, constitutes neither a trust nor charge enforceable against the devisee (Buggens *v.* Yeates, 8 Vin. Abr., 72; 1 Jarman on Wills, p. 387 *et seq.*, and cases cited).

The will of Hugh McCaffrey, the construction of which is involved in the present appeal, was, also, considered by the Court of Appeals of the District of Columbia in another and prior controversy, wherein a purchaser at judicial sale of certain of the real estate of said testator sought to be relieved of his purchase because of the uncertainty of the legal character and extent of the estate devised; and he was so relieved. (McCaffrey *v.* Little, *20 App. D. C., 116.*)

In that case it was apparently contended, in opposition to the relief sought by the purchaser, Little, that the charge to pay debts was upon the land devised, and that such charge operated to enlarge the estate, by implication, to a fee, the case of Cook *v.* Holmes (*11 Mass., 529*) being then urged in support of the contention; but the Court of

Appeals pointed out the distinction between a charge of debts upon lands devised, as not having the effect so contended for, and a charge of debts upon the devisee personally, in which latter case there are authorities sustaining the contention.

The present appellants now insist, however, that the devisee, Quigley, is charged *personally* with the payment of funeral expenses and debts.

It is quite clear under the authorities that unless the claim last asserted can be made applicable to the real facts of the case, the doctrine asserted in Cook *v.* Holmes will furnish no support to appellants' case, as that decision is in conflict with the uniform current of authority in this country.

The true rule of decision will be found stated in Wright *v.* Denn (*10 Wheat., 204, 236–7*), in an exceedingly able and instructive opinion by Mr. Justice Story.

There the court expressly held that a charge of legacies on lands devised would not enlarge the devise to a fee, and held, further, that a devise of "all and singular my lands, messuages and tenements, * * * freely to be possessed and enjoyed," passed an estate for life only.

In the case of Jackson *v.* Harris (*8 Johnson N. Y., 142*) the devise under consideration was in the following words:

"To my beloved son Henry * * * all this certain lot of land, which I now possess, and is known by No. 136, together with all my farming utensils, and likewise the 108 stock belonging to my estate."

Then followed specific legacies, all of which were directed by testator "to be raised and levied out of my estate."

The court, in its opinion, stated:

"If the personalty was sufficient to pay the legacies, that fund must first be resorted to; for it is the natural and legal fund for the payment of debts and legacies."

It was accordingly there held that the estate was not enlarged to a fee.

In the case of Burlingham *v.* Belding (*21 Wend., 463*) testator bequeathed certain personal property to his wife for life, and after her death to his son "Lawrence, *who is to take care of his mother during her natural life.*"

Following that provision was a devise of certain land, without words of perpetuity, to his son Silas, and then followed a devise of the land in suit to his said son Lawrence, likewise without words of perpetuity.

It was there contended that the charge upon the son Lawrence, "to take care of his mother during her natural life," enlarged the devise to him of the real estate to a fee; but the court declined to so rule, and held what is thus accurately expressed in the syllabus:

"A devise of lands without words of perpetuity, in a will made previous to the Revised Statutes, will not be construed to give *a fee by implication*, although there be a *personal charge* imposed upon the devisee, if there be *a fund other than the realty*, to which the devisee may look for indemnity, and in immediate connection with which the charge is imposed."

In this connection attention is asked to the case of Turnburke *v.* Parker (*2 MacA., 444*), where it was held that a charge of legacies (*i. e.*, debts) upon land will not exonerate the personal estate, unless the will shows a clear intention to so change this pecuniary liability—the personalty being the fund primarily responsible for debts (legacies).

The case of Moor *v.* Mellor (*5 Durnford & East, 284*) involved the construction of a will containing the following devise:

"*All* the rest of my lands, tenements and hereditaments, either freehold or copyhold, whatsoever and wheresoever,

and also all my goods, chattels and personal estate of what nature or kind soever, *after payment of my just debts and funeral expenses*, I give, devise and bequeath the same unto my wife, Sissily Carr; and I do hereby nominate and appoint her, my said wife, sole executrix of this my will."

There the same contention was urged as here, and couched in almost identical words:

"This estate is subjected to debts in the hands of the devisee, and therefore she must take a fee. Every devise is supposed to mean a benefit to the devisee. * * * In questions of this kind, courts have never examined the comparative value of the charge and the estate charged: it is sufficient if *by possibility* the devisee *may* be a loser by taking only an estate for life. * * * The devise of the real and that of the personal estate are coupled together, and this charge is annexed to both" (*p. 286*).

The court, however, overruled the contention, stating in conclusion:

"Whatever our conjectures may be (and privately speaking I think the devisor meant to give an estate in fee to his wife), we are not at liberty to follow those conjectures, but are compelled by the authorities to say that she only took an estate for life under her husband's will" (*p. 288*).

The case was then taken to the Court of Exchequer Chamber, where the judgment of the Court of King's Bench (*supra*) was reversed (*1 Bosanquet & Puller, 558*); whereupon it was removed to the House of Lords upon writ of error, where the first judgment, that of the Court of King's Bench, was reinstated and affirmed. The opinion of the judges, delivered by Macdonald, Ch. B., concluded:

"I am of opinion that * * * the weight of authority obliges me to conclude that Sissily Carr took only an estate for life" (*2 Bosanquet & Puller, 247, 253*).

The case of West *v.* Fitz (*109 Ill., 438*), cited by appellants, is neither useful nor instructive, since the opinion there points out that the omission of words of limitation or inheritance "is wholly without significance, either in a deed or will," by virtue of the provisions of the law of that State (*p. 436*).

In the case of Abbot *v.* Essex Co. (*18 How., 170*) relied upon by appellants, the will devised certain real estate, described as "*all* my lands and buildings," and also certain personal estate, to his two sons, John and Jacob, to be divided equally between them. The son John was appointed executor, and *in consideration* of the above provisions for said two sons the said executor was ordered to see that all just debts, funeral charges, and legacies be paid out of that part of the estate given to said two sons. The will also directed that the share of the one of the sons who should die first, without lawful heirs, should accrue to the survivor and his heirs.

The court held that the description of the devise employed in the will, namely, "estate" or "that part of my estate," was sufficient to carry the whole interest of the testator in the subject of the devise, namely, a fee. The opinion added that, moreover, the intention of a testator must be drawn from the whole context of his will. It further found that the son John was charged *personally* with the payment of all debts and legacies, the testator calling it the "consideration" to be paid for that part of the estate given.

The appellants further rely upon the case of King *v.* Ackerman (*2 Black, 408*).

An examination of the will involved and construed in that case will disclose that it is essentially different from the one here under consideration. There the testator thus directed:

"*In the first place*, I give and bequeath unto my son, Benjamin L. Benson, all that estate now occupied by

George Williams, to do and dispose of as he may think proper.

"I also give and bequeath unto my son, Benjamin L. Benson, the homestead where I now live, situated on Harlem river.

"*Secondly.* My will and intention is, that my son, Benjamin L. Benson, do give unto my grandchildren, after the decease of my wife, the sum of $1,500.

"*Thirdly.* The income of these legacies, and also of my estate, real and personal, I give unto my loving wife, Maria Benson, during her widowhood, to do and dispose of as she may think proper."

It will be observed that here there was a specific devise to the son of certain real estate, and, in a separate paragraph, a specific charge upon said son (devisee) of the payment of $1,500. The testator provided no fund out of which said payment could be made, but made the payment a charge upon the devisee *personally*.

In the opinion it is pointed out that the testator not only postponed the possession and enjoyment of the land devised to the son for an indefinite time (*i. e.*, widowhood of the wife), but charged him with the payment of a gross sum of money ($1,500) which he became personally liable to pay, for land that he might never personally possess or enjoy.

This reasoning of the opinion is both involved and obscure; the contingency of the devisee being charged personally with the payment of a gross sum of money for land that he might never personally possess or enjoy, would seem to be based upon the theory that the devise of the estate to the wife, during her widowhood, "to do and dispose of as she may think proper," operated to pass the fee, and that a disposition of the estate by her would defeat the remainder to the son.

Such construction, however, would defeat the holding of the court that the will operated to pass the fee to the

son; and, moreover, the contingency mentioned could not arise under the will, since the charge upon the son (devisee) personally did not take effect until after the death of the wife.

It may also be noted that in connection with one of the two pieces of real estate devised to the son, the testator fixed the quantum and character of the devise by using the description "*all* that estate now occupied by George L. Williams, *to do and dispose of as he may think proper.*"

This might well be held to pass the entire estate. The charge upon the devisee personally occurred in a separate paragraph, and the court concluded that the son took the remainder estate in fee in both parcels, even though the devise of the second parcel omitted the words "to do and dispose of as he may think proper."

It is submitted that neither of the cases relied upon by appellants, referred to and considered, is here controlling.

The situation in this case is substantially this: Testator, having given his daughter, Mary, practically all of his personal estate—in fact, all except a horse and buggy and watch and chain, but which the testimony shows he disposed of to a son before his death—very naturally and properly added that (out of the personal estate) she should pay his funeral expenses and debts. The personal estate so given her was largely in excess of funeral expenses and debts; in fact, she and her estate received something over $2,000 after the collectors and executors had paid the funeral expenses and debts. The administration of the estate shows that said debts were discharged in the usual and proper (legal) manner, namely, the collectors and executors discharged and paid them out of the personal estate (the fund primarily liable) and turned over to the legatee the balance.

The situation is well summed up in the opinion herein below:

"As we have before suggested, the testator died practically free from debt; he knew of what his personal property consisted when he gave it all, substantially, to Mary A. Quigley, in connection with an apparently excessive share of his landed property; and that a large surplus must necessarily remain to her after the discharge of all possible demands and expenses. Presumably, he knew that this personal property was first charged by law with the payment of debts and expenses. Having made the devise and bequest in one sentence, he then added the separate sentence: 'She is to pay funeral expenses, and any other legal debts I may owe,' etc.

Under all the surrounding circumstances, the practical effect of this clause would seem to be the same, substantially, as if he had expressly directed the payment to be made out of said personal estate, or had made the bequest of the same after the payment of funeral expenses and debts." (*R.*, *35*.)

It is forced, not to say strained, reasoning to pretend, in this case, that the charge was upon either land or devisee. The direction to pay debts was in immediate connection with the gift of the personalty.

The provision for paying debts was in no sense or way the result of the devise of the land.

Appellants now contend that, under the authorities, evidence touching the amount of the estate, or the relative value of the *burden* of charge upon the devisee and the *benefit* of the devise, cannot control the construction or extent of the devise, and it is now assigned as error that the court gave consideration to such evidence.

In reply to such objection, it is to be observed that the rule of decision so contended for, has its application to an ordinary devise of real estate accompanied by a charge of some kind upon the devisee personally—a situation quite different from that here uner consideration.

Here the testator gave and bequeathed to his daughter, Mary A. Quigley, practically his entire personal estate;

and, in that immediate connection, directed her to pay funeral expenses and legal debts—the will contained no legacies.

The proofs in the case show that in the ordinary course of administration of this estate by the collectors and executors, the personal estate was collected, reduced to possession, and administered; the funeral expenses and legal debts paid, and the balance, in excess of $2,000, paid over by the executors in accordance with the gift and bequest thereof to Mary A. Quigley. (*R.*, *14–24.*)

It was evidently not contemplated during the administration of this estate that the direction to pay funeral expenses and legal debts was a charge personally upon the devisee and legatee, Quigley, or that it was other than a direction that said daughter should have the personal estate, described, subject to the payment of debts, as in the ordinary course of administration.

If the devise was upon condition of payment by devisee as a charge upon her personally, it was never performed.

The evidence now complained of was clearly competent and material in respect of the issues involved in the case; and it is quite clear that appellants so then regarded it, inasmuch as the record discloses no objection whatever to the introduction of the evidence—indeed the appellants introduced evidence upon the same matter. (*R.*, *21–24.*)

Furthermore, the evidence having been introduced on both sides, without objection, there was no motion before the trial court to exclude it; it was not even assigned as error in the court below, and it is submitted that it is now too late to urge, for the first time, error in respect of the admission or consideration of such evidence, so far as the same may have any controlling bearing upon the questions under consideration.

It is submitted that the devise to Mary A. Quigley cannot be enlarged, by implication, to a fee.

III.

Even if the Quigley Devise is so Enlarged, the Other Devises in the Will are not Aided Thereby.

Appellants assert, first, that the Quigley devise was enlarged to a fee; and, second, that that enlargement must likewise be held to extend to the other devises contained in the will, and this notwithstanding the fact that such other devises contain no conditions or limitations whatever.

In support of such contention, appellants cite the case of Butler *v.* Butler (*2 Mack, 96–104*). That case, however, was totally different in its facts, involving a question of construction merely, and having no relation whatever to an enlargement of an estate by legal implication because of any charge made in respect of the devise, or in respect of the devisee, and has here no useful application.

The same thing is true in the case of White *v.* Crenshaw (*5 id., 113*), where the court found, from the entire will, an intention by testatrix to pass a fee in respect of several devises of real estate; and that the language used by testatrix should be understood and applied as she had defined it in the will.

So, in the case of King *v.* Ackerman, *supra*, two separate parcels of real estate were devised to the son of testator, and, in another paragraph of the will, the son (devisee) was charged personally with the payment of a named amount; and this personal charge (together with the other matters referred to in that case) was held to pass a vested remainder in fee to the devisee as to all the property devised to him.

Finally, appellants cite the case of Cook *v.* Holmes (*11 Mass., 529*), as controlling authority for the proposition that if by reason of the limitation or condition attached to the devise and bequest to Mary A. Quigley, her

devise is enlarged, by implication or presumption, to an estate in fee, such enlargement is to be extended throughout the entire will as to every devisee named therein, even though as to the latter the devise is unaccompanied by any limitation, condition, or charge, of any kind whatever.

A mere reading of the opinion, however, in that case will show that it is in no sense decisive of the question, since there the testator had expressly announced that the purpose of his will was to make *equal* provision for the several beneficiaries, and the court simply made that declaration of intention effective.

Hence, in the present case, it cannot be said that any one devise is given character by any other, and inasmuch as said other devises contained no words of limitation or inheritance, and cannot be extended by legal implication, it must necessarily result that they respectively passed a life estate only.

IV.

The Decree is not Objectionable by Reason of any Recitals Therein.

Objection is urged, by certain of the appellants, as to the form of decree in this case, in that it is therein recited that the several devisees took and acquired each only a life estate for his or her life, respectively, and that none of said devises was enlarged to a fee by reason of anything in the will contained; or by reason of any charge made or duty imposed upon Mary A. Quigley.

This objection, it is submitted, is purely technical and without merit.

The bill was filed specifically praying for the construction of the will of Hugh McCaffrey, and in the averments thereof it will be found stated that:

"Because there was by the said will imposed upon the said Mary A. Quigley the personal duty to pay his funeral expenses and the legal debts of the testator, an estate in fee simple passed to her * * * although there *was* in said devise no words of inheritance, and * * * such intention must be found to have existed in respect to the several other devises so by said will made." (*R.*, *6.*)

The question principally argued both below and here is whether or not the devise to Mary A. Quigley was enlarged to a fee, that question being of prime importance in order to a determination of the remaining questions.

In a suit, the only purpose of which is the construction of a will, it is, to say the least, difficult to see just how a court could enter a decree without in some way stating the true construction, and applying that conclusion to the particular subjects-matter to be adjudicated.

This is all that was done in the present decree, and it would seem to be unobjectionable, so far as its recitals are concerned.

The further objection urged by appellants, namely, alleged error of the court in overruling motion to modify the decree by striking therefrom the recitals above referred to, needs no comment, as it is not an appealable order, as has been repeatedly held by this court; and, even if it were, no appeal was taken therefrom (*R.*, *27–8*).

The decree below is right, and should be *affirmed*.

Respectfully submitted.

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WASHINGTON, D. C., *January 9, 1905.*